

## TITLE

**CAPITAL MANAGEMENT DESIGN AND CONSTRUCTION NON-COMPETITIVE PROCUREMENT**

## SCOPE

Provincial

## DOCUMENT #

1152-08

## APPROVAL AUTHORITY

Enterprise Risk Management Executive Committee

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## SPONSOR

Capital Management

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**NOTE:** The first appearance of terms in bold in the body of this document (except titles) are defined terms – please refer to the Definitions section.

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This Procedure is to be used in conjunction with the *Corporate Contracts* Policy. This Procedure only applies to Capital Management design and construction **corporate contracts**.

**OBJECTIVES**

- To set out the process and conditions for **non-competitive procurement** of goods and services associated with the design and construction **contracts** managed by Capital Management design and construction.
- To outline the circumstances under which the different types of non-competitive procurements are approved and the analysis used to review whether **procurement** is exempt from the requirement to hold a fair and equitable competition.

**APPLICABILITY**

Compliance with this document is required by all Alberta Health Services employees, members of the medical and midwifery staffs, students, volunteers, and other persons acting on behalf of Alberta Health Services (including contracted service providers as necessary).

**ELEMENTS****1. Trade Agreements**

- 1.1 As directed by the Government of Alberta, Alberta Health Services (AHS) must comply with the procurement provisions of the following trade agreements:
  - a) The *Canadian Free Trade Agreement (CFTA)*, being an agreement between the governments of all provinces, territories, and the federal government;

- b) The *New West Partnership Trade Agreement* (NWPTA), being an agreement between the governments of Alberta, British Columbia, and Saskatchewan; and
  - c) The *Trade, Investment, and Labour Mobility Agreement* (TILMA), being an agreement between the governments of Alberta and British Columbia.
- 1.2 These agreements identify procurement thresholds and approaches so that the procuring party cannot avoid competition, discriminate between vendors, or give undue advantage to a vendor. These agreements also establish penalties for non-compliance. The failure to adhere to these agreements could have a very serious and detrimental effect to AHS, both financially and to its reputation.
- 1.3 For procurements under the thresholds, refer to Appendix A which outlines the four categories for procurement options.
- 1.4 Where an **approved procurement exception (APE)** or sole source approval is being requested it must be approved before a vendor is engaged to provide an order of magnitude or firm quote or the material is specified in the construct documents/scope of work.
- 1.5 The following sections of this Procedure outline the distinction and process to obtain an exception to a competitive or multi-vendor procurement.

## 2. **Approved Procurement Exception and Sole Source**

- 2.1 There are two categorizations of non-competitive procurement (i.e., a procurement where the vendor is not selected as a result of a competitive process):
- a) an approved procurement exception (APE), being the acquisition of goods/services including construction:
    - (i) without the vendor being selected as a result of an open competition; and
    - (ii) where the procurement is exempt from the requirement to hold a fair and equitable competition in the applicable trade agreements; or
  - b) a sole source, being the acquisition of goods/services including construction:
    - (i) without the vendor being selected as a result of an open competition; and
    - (ii) where the procurement is not exempt from the requirement to hold a fair and equitable competition in the applicable trade agreements.

- 2.2 Within Capital Management, the process to obtain approval is the same between an APE and a sole source, however there is a more rigorous approval requirement for a sole source.

### 3. Approved Procurement Exception

- 3.1 An APE complies with the trade agreements identified in Section 1 above. The trade agreements set out conditions under which a transaction is typically “exempt” from the requirement to hold an open, transparent **competitive procurement**. Although not an exhaustive listing, examples of such determining conditions include:
- a) whether a transaction is considered a procurement in accordance with the trade agreements (see Section 6.1 below for details);
  - b) whether the value of a procurement exceeds certain dollar thresholds (see Section 6.2 below for details);
  - c) whether a general exemption is applicable such as the parties involved in a procurement are a public body (see Section 6.3 below for details and a listing of exemptions); and
  - d) whether an exemption is applicable such as if the specific procurement is considered proprietary, confidential in nature, or required due to unforeseen emergency (see below for details and a listing of exemptions).
- 3.2 It is important to justify the legitimacy of an APE procurement. The end-user/requestor is responsible for making an assessment of the nature of the procurement (i.e., being exempt or not) and, when considered exempt, performing functions necessary to support the rationale for an APE procurement. In this respect, the end-user/requestor shall provide sufficient written information in order for the Capital Management Position Approval Level to make an informed decision, as described further in Section 6 below.
- 3.3 The determination of whether a procurement is exempt or not is made utilizing the analysis described in Section 6 below.
- 3.4 To support the analysis as described in this Procedure, the timely advanced engagement of Capital Management Position Approval Level is strongly encouraged by end-user/requestor. Advance engagement is not only helpful for planning purposes but is also required in some instances to support the rationale for an APE. For example, advance engagement may allow AHS the opportunity to conduct a compatibility analysis or allow AHS to conduct other processes to determine if a transaction is exempt or not.
- 3.5 Approval for an APE is limited to, and must be provided by, the Capital Management Position Approval Level. The Capital Management Position Approval Level may approve or reject the recommendation from the end-user/requestor or request additional information from the end-user/requestor to

support the non-competitive procurement strategy rationale. In cases where the Capital Management Position Approval Level rejects the documented rationale, the Capital Management Position Approval Level shall provide a brief explanation to the requestor.

- 3.6 For an APE, the approval level required by Capital Management to procure a good or service including construction from a specific vendor is as follows:

<b>Position Approval Level</b>	<b>Value of the Procurement</b>	
Chief Program Officer, Capital Management	Over \$1,000,000	
Senior Program Officer, Capital Management	Up to \$1,000,000	
Requirement for Approved Procurement Exception documentation is not required	Goods and Services Under \$25,000	Construction Under \$25,000

#### 4. Sole Source

- 4.1 Sole source procurements are not permitted as exemptions under the trade agreements and are subject to a high-level management approval process. AHS does not encourage the use of sole source and they are to be avoided whenever possible. Sole source procurements are only approved in extraordinary situations, including where critical patient care may be directly or indirectly impacted and the procurement does not fit within the interpretation of an APE.

- a) It is strongly advised that end-user/requestor engage Capital Management Position Approver Level as early as possible in the procurement process when a sole source is a possibility.
- b) Legal & Privacy is available to ascertain the level of risk to AHS and to see if an exemption is available in the applicable trade agreements.

- 4.2 As set out in Section 4.1 above, circumstances arise in health care where sole source procurement approval may occur. Examples of sole sources which may have a reasonable justification include where:

- a) there is a personal/clinical need; or
- b) an extraordinary circumstance exists:

that is supported either internally with a written business or clinical justification, or externally pursuant to a process such as a notice of intent to sole source (see Section 4.7 below), or other external process, as appropriate, demonstrating that only one vendor can reasonably meet AHS' needs, and that such a procurement is not otherwise an APE.

- 4.3 At times there are preventable circumstances where the Capital Management Position Approval Level is requested to approve a sole source.
- a) Failure to plan sufficiently in advance of a need or act on the advice of the Capital Management Position Approval Level with respect to a sourcing matter resulting in insufficient time to conduct a fair and open competitive process does not constitute an emergency, is preventable, is discouraged, and approval shall be rejected, apart from exceptional cases.
- b) Even in circumstances where a preventable sole source is approved, the end-user/requestor requesting the sole source shall be required to take steps to ensure that preventable circumstances are not repeated.
- 4.4 The circumstances outlined in Section 4.2 and 4.3 above shall be avoided where possible. In such circumstances, where approval is sought for a sole source, the approval level required for procuring a good or service, including construction, from a specific vendor is as follows:

<b>Position Approval Level</b>	<b>Single Year Procurement</b>	<b>Multi-year Procurement</b>
AHS Board	Over \$30,000,000	Over \$90,000,000
President & Chief Executive Officer	Up to \$30,000,000	Up to \$90,000,000
Vice President, Corporate Services and Chief Financial Officer	Up to \$20,000,000	Up to \$60,000,000
Chief Program Officer, Capital Management	Up to \$7,500,000	Up to \$30,000,000
Senior Program Officer, Capital Management	Up to \$500,000	
Requirement for sole source documentation is not required	Goods and Services Under \$25,000	Construction Under \$25,000

- 4.5 The Chief Program Officer (CPO), Capital Management or higher level, shall either approve the sole source or make a recommendation to the Vice President, Corporate Services & Chief Financial Officer (CFO). All requests for approval submitted to the President and Chief Executive Officer (CEO), or the CFO must be accompanied by a written recommendation from, and signed by, the CPO Capital Management. Legal consultation may be required.
- 4.6 Each approval sought for a sole source is subject to documented verification as to all aspects of the procurement.
- 4.7 Notice Advising of AHS' Intent to Sole Source

- a) As indicated in Section 4.2 above, the Capital Management Position Approval Level may elect to advise the marketplace of AHS' intentions to enter into a contract with a particular vendor(s) (the "contemplated vendor") by posting a notice on the electronic tendering system Alberta Purchase Connection and/or BuildWorks for at least ten (10) working days inviting any person or entity who objects to the sole source to notify AHS in writing of their objections. In cases where the contemplated vendor is not to be named in the notice, approval at the CPO, Capital Management or above is required.
- b) In the event:
  - (i) no qualified responses are received (either because no vendors have responded or any vendors who have responded do not qualify as meeting AHS' requirements, as set out in the notice and determined by AHS), AHS may sole source the procurement to the contemplated vendor. In cases where a vendor's submission is rejected as being unqualified, the concise rationale for rejecting the submission must be documented by the AHS program group and approval to sole source may possibly be sought as an APE (see Section 3.6 above); or
  - (ii) one or more qualified vendors reply to advertisement, AHS should pursue a competitive procurement or, alternatively, in exceptional circumstances where in AHS' assessment it deems a particular vendor's response (either the contemplated vendor or a new vendor) as more favourable in meeting AHS' requirements, then approval to sole source shall be sought as a sole source.
- c) The Capital Management Position Approval Level, in consultation with Legal & Privacy, shall determine the structure of the notice document including whether or not, and to what extent, a particular notice sets out AHS' requirements. AHS shall not be obligated to change its requirements to accommodate responding vendors provided that AHS does not do so to avoid competition or give an undue advantage to a vendor.
- d) In establishing the content of the notice document and corresponding process as described in Section 4.7 above, the Capital Management Position Approval Level shall establish guidance in consultation with Legal & Privacy, as updated from time to time.

## 5. Documenting and Evaluating Non-Competitive Procurement Rationale

- 5.1 When submitting a non-competitive procurement request, the end-user/requestor is responsible for providing written documentation containing the rationale to justify the non-competitive procurement to the Capital Management Position Approval Level who will then evaluate the documentation to determine

whether the non-competitive procurement is justified in accordance with this Procedure.

- 5.2 The submission of the request shall be through the Capital Management e-Facilities Projects Module for multi-vendor, multi-invoice design and construction projects and through email for single trade, single payment projects. The rationale must be clear, concise, and evidence based and provide sufficient information to support the non-competitive procurement evaluation process (see Section 6 below) allowing the Capital Management Position Approval Level to make an informed assessment of the appropriateness of the non-competitive procurement request in accordance with this procedure.

## 6. Non-Competitive Procurement Evaluation Process

Note: This Section details the steps to be performed by the Capital Management Position Approval Level when evaluating whether a non-competitive procurement is justifiable under the exemptions provided for in the trade agreements. This process should be followed for each non-competitive procurement request:

### 6.1 Step 1 – Is the Transaction a Procurement?

Under the trade agreements, only procurements are subject to the need to conduct a competition. Therefore, the first step is to determine if the transaction planned is a procurement. A procurement, as defined under the trade agreements:

- a) is an acquisition by any means, including purchase, rental, lease, or conditional sale or lease;
  - (i) If you are not buying, renting, or leasing something, it is not a procurement.
- b) is paid for by AHS (payment can be cash or other consideration);
  - (i) If it is free, it is not a procurement (in this regard, equipment given free but tied to another commitment (e.g., consumable usage), is not free).
- c) Is for goods, services, or construction;
  - (i) If it is not goods, services, or construction, it is not a procurement.
- d) is not a transaction in nature of government assistance like grants or loans; and
  - (i) Government assistance is not a procurement.
- e) is not a transaction with another governmental body.

- (i) A transaction with any level of government, even if AHS is buying goods, services or construction, is not a procurement.

If the transaction is a procurement as set out above, proceed to Step 2. Otherwise, no competition is required.

#### 6.2 Step 2 – Does the Procurement Exceed the Thresholds?

Generally, the trade agreements require that all procurements which exceed a set threshold are subject to a competition. Refer to Appendix A for procurement requirements under the thresholds.

#### 6.3 Step 3 – Exceptions

The CFTA, NWPTA, and TILMA contain exceptions where open competition is not mandated. While the exceptions are similar, NWPTA and TILMA are more limiting. AHS is obligated to comply with the more limiting restrictions. Appendix A contains a summary of exceptions to trade agreement restrictions. Open competition is mandated if these exceptions do not apply.

## DEFINITIONS

**Approved procurement exception (APE)** means the acquisition of goods/services, including construction, which is created or arises by means of a non-competitive process where the procurement is exempt from the requirement to hold a fair and equitable competition in the applicable trade agreements.

**Competitive procurement** means the procurement by AHS of goods, equipment, construction and/or services reflected in a corporate contract which is created or arises by means of a competitive process that complies with applicable trade agreements.

**Contract** means a legally enforceable agreement made between AHS and one or more parties. For the purposes of this Procedure, a contract shall include, but not be limited to, agreements such as a binding memorandum of understanding, letter of intent, early start letter, information sharing/management/data sharing agreement, confidentiality/non-disclosure agreement, and purchase orders used to effect a procurement.

**Corporate contracts** means all contracts except:

- Human Resources contracts (contracts relating to human resources functions which govern AHS employees, students and volunteers, and which do not pertain to goods, services or equipment);
- Research contracts (contracts relating to research ethics board approved research, including agreements relating to clinical trials, and observational/retrospective research, including but not limited to clinical trial agreements and research-related confidential disclosure, biological material transfer, and data transfer agreements); and



- Self-Managed Care contracts (contracts with AHS clients/patients to provide them with funds to pay for their own home care services with a 3<sup>rd</sup> party provider).

**Non-competitive procurements** means the procurement by AHS of goods, equipment, and/or services reflected in a corporate contract which is created or arises by means of a non-competitive process.

**Procurement** means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services, equipment or construction, but does not include:

- any form of assistance that AHS or its procuring entities provides, including cooperative agreements, grants, loans, equity infusion, guarantees or fiscal incentives; or
- provision by AHS of goods and services to persons or other government organizations, including government entities.

**Sole source** means the acquisition of goods/services, including construction, which is created or arises by means of a non-competitive process where the procurement is not exempt from the requirement to hold a fair and equitable competition in the applicable trade agreements.

## REFERENCES

- Appendix A: Procurement Exceptions in the Trade Agreements
- Alberta Health Services Governance Documents:
  - *Capital Management Design and Construction Procedure* (#1152-06)
  - *Capital Management Design and Construction Change Management Procedure* (# 1152-07)
  - *Capital Management Emergency Building Infrastructure Project Procedure* (#1152-09)
  - *Code of Conduct*
  - *Conflict of Interest Bylaw*
  - *Corporate Contracts Policy* (#1152)
  - *Collection, Access, Use, and Disclosure of Information Policy* (#1112)
  - *Delegation of Approval Authority Policy* (#1168)
- Non-Alberta Health Services Documents:
  - *Canadian Free Trade Agreement*
  - *New West Partnership Trade Agreement*
  - *Trade, Investment, and Labour Mobility Agreement*

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## APPENDIX A

### Procurement Exceptions in the Trade Agreements

As a publicly funded health entity that exercises authority delegated by law with accountability to the Government of Alberta, AHS is obliged to follow the procurement provisions described in certain trade agreements – Canadian Free Trade Agreement and New West Partnership Trade Agreement (NWPTA) (the “Trade Agreements”). As a general principle, procurement must be conducted in a manner that is open, fair, non-discriminatory and non-restrictive to trade, investment and labour mobility amongst the Provinces (the “Procurement Principles”), but the Trade Agreements do allow for exceptions to the Procurement Principles. Further AHS has established thresholds under the Trade Agreement thresholds that further define when a single vendor is permitted and when seeking submissions from multiple vendors is required. These are noted in the first and second categories in the table below.

The procurements listed in the third category below represent exceptions to competitive procurement that apply to AHS that are specifically listed in the Trade Agreements. The procurements conducted under these provisions are called Approved Procurement Exceptions (APE). The fourth category contains a list of potential circumstances under which a non-competitive procurement may be conducted and which are not specifically listed in the Trade Agreements as procurement exceptions but for which there may be a justification or legitimate objective to conduct a non-competitive procurement process. The procurements conducted under these provisions are categorized as Sole Source (SS) procurements.

All Approved Procurement Exceptions (APE) and Sole Source (SS) procurements are to be forwarded, along with any supporting and background information, to the Capital Management Position Approval Level for approval prior to obtaining an order of magnitude cost, quote, contract initiation and implementation.

**The onus to provide a written rationale justifying the requirement for an Approved Procurement Exception or to Sole Source lies with the end-user/requestor. It will be Capital Management Position Approval Level responsibility to validate this justification.**

Category	<u>Below Trade Agreement Procurement Value Thresholds</u>
<p>1.  <b>Below \$25,000</b></p>	<p><b>Procurements of goods and services below \$25K and for construction below \$25K.</b> The relevant trade agreement obligations to follow a competitive procurement process do not apply to procurements below these thresholds. This value is the cumulative total of all such like procurements for the particular goods, services and construction including all change orders and amendments rather than the individual transaction amount. Thus, AHS will ensure that wherever practical, AHS will use the most appropriate methodology to ensure tax dollars are spent to maximize value and put in place processes to monitor for instances of procurement splitting and repeat extensions to contracts to avoid these thresholds.</p> <p>Under Threshold procurements, except as noted in category 2 when using the Capital Management Consultant and/or Contractor multi-use pre-qualification <b>vendor</b> list,</p>

Category	<u>Below Trade Agreement Procurement Value Thresholds</u>
	should seek to utilize local vendors where qualifications and skillsets permit and wherever practical and appropriate.
<p>2. <b>Between \$25,000 and Threshold</b></p>	<p><b>Procurements of goods and services below \$75K and for construction below \$200K.</b> The relevant trade agreement obligations to follow a competitive procurement process do not apply to procurements below these thresholds. This value is the cumulative total of all such like procurements for the particular goods, services and construction including all change orders and amendments rather than the individual transaction amount. Thus, AHS will ensure that wherever practical, AHS will use the most appropriate methodology to ensure tax dollars are spent to maximize value and put in place processes to monitor for instances of procurement splitting and repeat extensions to contracts to avoid these thresholds.</p> <p>When the Capital Management Consultant and/or Contractor multi-use pre-qualification <b>vendor</b> list is used, all vendors in the category and class for the particular Zone are to be invited to participate in the opportunity,</p> <p><b>Cumulative values over these values, or if only one vendor or one material is able to complete or meet the need of the design and construction project, are to proceed with a competitive procurement unless the following exceptions apply and have been approved:</b></p>
Category	<u>Trade Agreement Approved Procurement Exceptions (APE)</u>
<p><b>Approved Procurement Exceptions (APE).</b> Procurements in the circumstance listed below qualify as exceptions from Trade Agreement sourcing requirements:</p>	
<p>3. <b>Approved Procurement Exception</b></p>	<p><b>APE1</b> – Where <b>only one supplier</b> is able to meet requirements of a procurement, in one of the circumstances listed below:</p> <ol style="list-style-type: none"> <li>a. To ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licenses, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative;</li> <li>b. where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists;</li> <li>c. for the procurement of goods or services the supply of which is controlled by a supplier that is a statutory monopoly;</li> <li>d. for work to be performed on or about a leased building or portions thereof that may be performed only by the lessor;</li> <li>e. for work to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work;</li> <li>f. for a contract to be awarded to the winner of a design contest;</li> </ol>

Category	<b><u>Below Trade Agreement Procurement Value Thresholds</u></b>
	<p>g. for the procurement of a prototype of a first good or service to be developed in the course of and for a particular contract for research, experiment, study or original development, but not for any subsequent purchases;</p> <p>h. for the purchase of goods under exceptionally advantageous circumstances such as bankruptcy or receivership, but not for routine purchases;</p> <p>i. for the procurement of subscriptions to newspapers, magazines or other periodicals; and</p> <p>j. for the procurement of real property.</p>
	<p><b>APE2</b> – Procurements in an <b>unforeseeable situation of urgency</b> where the goods, services or construction could not be obtained in time by open procurement procedures. <b>Note this does NOT include urgent situations arising due to a lack of due diligence and/or planning;</b></p>
	<p><b>APE3</b> – Procurement regarding matters of a <b>confidential nature</b> where an open bidding process could compromise government confidentiality, cause economic disruption or be contrary to public interest.</p> <p><b>Note: This exemption only applies to goods or consulting services.</b></p>
	<p><b>APE4</b> - Procurements for <b>health or social services.</b></p>
	<p><b>APE5</b> – Procurement in <b>absence of receipt of bids</b> in response for a call for tender.</p>
	<p><b>APE6</b> - Procurements for services provided by <b>lawyers and notaries.</b></p>
	<p><b>APE7</b> - Procurement contracts with a <b>public body or not-for-profit organization.</b></p>
	<p><b>APE8</b> - Procurement from <b>philanthropic institutions, prison labour or persons with disabilities</b></p>
	<p><b>APE9</b> - Procurement of <b>goods intended for resale to public</b></p>
	<p><b>APE10 – Fully Exempt</b> - Water, energy (renewable/alternative), conservation, aboriginal, treasury, donation funds as these procurements have full exemptions from Trade Agreement sourcing requirements.</p>

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Category	<u>Below Trade Agreement Procurement Value Thresholds</u>
	<p><b>APE11 Legitimate Objectives.</b> The following categories of procurements are listed in the Trade Agreements as legitimate objectives that are exceptions to the Procurement Principles. The onus is on the procuring entity to demonstrate the necessity of the requirement, its non-restrictiveness and that it is not disguised:</p> <ul style="list-style-type: none"> <li>a. Public security and safety;</li> <li>b. Public order;</li> <li>c. Protection of human, animal or plant life or health;</li> <li>d. Protection of the environment;</li> <li>e. Consumer protection;</li> <li>f. Protection of the health, safety and wellbeing of workers; or</li> <li>g. Affirmative action programs for disadvantaged groups (where APE8 does not apply);</li> </ul>

Category	<u>Sole Source</u>
	<p><b>Sole Source (SS)</b> – Non-competitive procurements under the following potential circumstances are deemed to be Sole Source procurement as these exceptions are not specifically listed in the Trade Agreements as exceptions to the Procurement Principles. However, there may be a justification or legitimate objective to conduct a non-competitive procurement in these cases. Where procurements are conducted in these circumstances, a conscious decision is being made not to conduct a competitive procurement despite the existence of more than a single vendor. Consequently, these procurement requests are subject to a high level management approval process (see this <i>Non-Competitive Procurement Procedure</i> document #1152-08).</p> <p>AHS does not encourage the use of Sole Sources and they should be avoided where possible. Sole Source procurements will only be approved in extraordinary situations, including where critical patient care may be directly or indirectly impacted and the procurement is not otherwise an Approved Procurement Exception (APE). Requestor <b>MUST</b> engage with Capital Management Position Approval Level as early as possible in the procurement process when a Sole Source is a possibility. Capital Management Position Approval Level will consult with Legal and Privacy where necessary to ascertain the level of risk to AHS and to see if the intended Sole Source procurement may be an Approved Procurement Exception (APE).</p>